

# Exhibit 23

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF MONTEREY

**CERTIFIED COPY**

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The Inns by the Sea )  
vs. ) CASE NO. 20CV001274  
California Mutual Insurance )  
Company )  
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, AUGUST 4, 2020

BEFORE THE HONORABLE LYDIA M. VILLARREAL, JUDGE

APPEARANCES:

FOR PLAINTIFF: SAM FERGUSON  
(APPEARING ON COURT CALL) ATTORNEY AT LAW  
MICHAEL J. REISER  
ATTORNEY AT LAW  
FOR DEFENDANT: RYAN Z. KELLER  
(APPEARING ON COURT CALL) ATTORNEY AT LAW  
STEVEN HAYES  
ATTORNEY AT LAW

REPORTED BY: JAMIE L. SETTERQUIST CSR 13362  
OFFICIAL COURT REPORTER  
MONTEREY COUNTY SUPERIOR COURT

1 MONTEREY, CA; Monday, August 6, 2020; 9:24 A.M.

2  
3 P R O C E E D I N G S

4 THE COURT: Inns by the Sea versus California  
5 Mutual Insurance Company.

6 MR. KELLER: Good morning Your Honor. Ryan  
7 Keller on the phone for Defendant, California Mutual  
8 Insurance Company. I also have Steven Hayes from my  
9 office on the phone.

10 THE COURT: I appreciate you doing it, but  
11 it's easier for me if I do it. Sam Ferguson for Inns by  
12 the Sea?

13 MR. FERGUSON: Good morning. Sam Ferguson for  
14 Inns by the Sea.

15 THE COURT: Thank you very much. Steven Hayes  
16 for California Mutual?

17 MR. HAYES: Good morning, your Honor.

18 THE COURT: And who is going to be speaking on  
19 behalf of California Mutual? Will it be Mr. Hayes or  
20 Mr. Keller?

21 MR. KELLER: Mr. Keller, your Honor.

22 THE COURT: Thank you very much. Mr. Keller  
23 on behalf of The Inns by the Sea.

24 MR. REISER: Good morning, your Honor.  
25 Michael Reiser.

1                   THE COURT:   And who will be speaking on behalf  
2   of plaintiffs?

3                   MR. FERGUSON:   Sam Ferguson of the Meade Law  
4   Firm will be speaking on behalf of Inns by the Sea as  
5   plaintiffs.

6                   THE COURT:   All right.   Thank you so much.   So  
7   I have gone over what you filed, and let me just start  
8   by saying the economic damage caused by COVID is just  
9   heartbreaking, and this case is yet one more of the  
10   heartbreak.

11                   There are two things that are of concern to  
12   me.   It seems to me that the language of the policy  
13   supported the defendant's position that it talks about  
14   the business suspension must be caused by direct  
15   physical loss of or damage to property at the premises,  
16   and it seems that the cases for the most part are --  
17   seek to address some sort of physical destruction or  
18   physical change in usefulness, and I am not sure that  
19   COVID creates that physical change.

20                   Now, what I think gives me pause is that I am  
21   trying to understand the other cases that have been  
22   referenced by the plaintiffs, and that is that smoke  
23   damage is considered physical damage, persistent E. Coli  
24   infestation is physical, gasoline vapors are physical,  
25   carbon monoxide saturation is physical, and certainly

1 large quantities of asbestos in the air is considered  
2 physical.

3 So I am just wondering whether or not COVID is  
4 enough like these other things such that it should be  
5 covered.

6 So that is sort of my thoughts, and let me  
7 just start with Mr. Ferguson.

8 MR. FERGUSON: Thank you, your Honor. To  
9 directly address your concerns here, I think there is an  
10 important way we can view all of the cases you mentioned  
11 of smoke damage, E. Coli, gas vapors, carbon monoxide,  
12 and one way to view those cases is view the atmosphere  
13 in the air within the insured property as part of the  
14 physical premises of the property. I think this is  
15 exactly what the *Oregon Shakespeare* case does, which as  
16 you mentioned the case of smoke infestation of the  
17 *Oregon Shakespeare Festival*, and one way to think about  
18 coronavirus, there is actually a contamination of the  
19 air within the physical spaces that results in a change  
20 on the molecular level of the composition of the air and  
21 space.

22 What these cases hold is that when there is a  
23 physical change or when there is a physical invasion of  
24 a harmful substance that renders a space functionally  
25 useless, you have direct physical loss of or damage to

1 property within insurance coverage.

2 And now, your Honor, I certainly sympathize  
3 with your struggle over whether coronavirus is similar  
4 enough to smoke, E. Coli, gas vapors, carbon monoxides,  
5 and asbestos, but it does seem to me that those concerns  
6 raise a factual question of what are the characteristics  
7 of coronavirus? How present was it on this premises?  
8 How dangerous was it and what quantities? Those are all  
9 factual questions that can be addressed in discovery.

10 And with respect to the demurrer, the  
11 defendants are making a legal point here. They are  
12 saying under no circumstances does our policy -- does  
13 our insurance policy provide coverage for the insured in  
14 the absence of tangible alteration to the property.

15 Now, I think as we point out in our brief --  
16 and I won't belabor the point -- that is not actually  
17 consistent with the language of their own policy, and  
18 one of the primary interpretative goals in looking at  
19 the insurance policy is you need to make sure that every  
20 word in that policy makes sense. You can't reach an  
21 interpretation of a policy that renders superfluous  
22 language.

23 To point out the obvious, defendant excludes  
24 from coverage the mere presence of bacteria. Now, that  
25 exclusion only makes sense if it is against a backdrop

1 of damage that goes beyond tangible alteration of the  
2 property. There would be no reason to exclude the  
3 presence of bacteria if the policy only covered tangible  
4 alteration to property.

5 So, your Honor, I think that addressed your  
6 concern, and I will leave it there for now. I am happy  
7 to speak more at length about other issues, but I will  
8 leave it there for right now.

9 THE COURT: Well, let me ask you another  
10 question about that. When I was struggling with the  
11 smoke damage, gasoline vapors, et cetera, the  
12 distinction in my mind -- and I don't know if this is  
13 one that is valid or not, Mr. Ferguson -- the  
14 distinction in my mind is that when California shut  
15 down, when the Governor ordered us all to shelter in  
16 place and businesses to close, it wasn't necessarily  
17 because there was COVID at your hotels. It was because  
18 there was a fear that COVID might arrive at your hotels,  
19 and there was a fear by having people move around the  
20 state, that that would cause us all to infect each  
21 other.

22 So even if we assume that COVID infects the  
23 air, which I get your point on that, I think the science  
24 supports you on that, but I guess the question I have  
25 is, was that the cause?

1                   MR. FERGUSON: So, your Honor, to address your  
2 concerns here, I think it is important to understand  
3 that there are two independent possible sources of  
4 coverage here. The first is the business interruption  
5 insurance coverage, which would be triggered by the  
6 physical presence of coronavirus on the insured  
7 premises. That is our property, and that is what we  
8 allege is our burden to prove that once we get into  
9 discovery.

10                   But I think on the allegations, we certainly  
11 have met the requirements for the complaint that we have  
12 alleged that there was coronavirus on the premises,  
13 which caused physical loss of or damage to the premises.

14                   The other independent source coverage that we  
15 have under this policy is civil authority coverage, and  
16 that doesn't require that there even be coronavirus on  
17 our property. It merely requires that there is direct  
18 physical loss of or damage to property somewhere else,  
19 and that the civil authority take action based on the  
20 presence of coronavirus on another property.

21                   Now the coronavirus is widespread in both of  
22 the county orders. The San Mateo County order and  
23 Monterey County order mentioned there is coronavirus  
24 virus within both of the counties. They mention  
25 specific case numbers. They mention case numbers up in



1 the Bay Area. It is clear in our mind that the local  
2 county authority and the Governor are responding to the  
3 physical presence of coronavirus in enacting the shelter  
4 in place order.

5 And to underscore the point, this is about the  
6 physical presence of coronavirus. I think those orders  
7 are designed to require people to avoid direct, physical  
8 contact with the virus. That is the key issue here.  
9 150,000 people in this county have died because they  
10 have come into physical contact with the virus.

11 I think that the virus is certainly physical,  
12 and the orders are in response to the physical presence  
13 of the virus that is at other locations and inside the  
14 insured premises.

15 THE COURT: Okay. So let me make sure I am  
16 understanding you. So the business income is lost  
17 because of the civil authority shutdown. Doesn't that  
18 also require a direct physical loss, and don't we still  
19 come back to the same problem of whether or not COVID  
20 causes a physical loss?

21 MR. FERGUSON: Yes; that is correct, your  
22 Honor. To trigger the civil authority coverage, it is  
23 our burden in discovery to show that there was  
24 coronavirus on another property.

25 And what is interesting about the civil

1 authority coverage in this insurance policy is it is  
2 written incredibly broadly. Typically, in other civil  
3 authority provisions, there is actually a proximity  
4 requirement. In our case, there actually is no such  
5 proximity requirement.

6 So we believe that there was the physical  
7 presence of coronavirus that caused a loss of or damage  
8 to property essentially anywhere within two counties.  
9 And as a result of that, the civil authority within the  
10 county's order to ensure premises to be shut down.

11 So when you look at the claim for civil  
12 authority in the context of this case and the context of  
13 the policy that is in front of you, we think that we  
14 sufficiently allege that there is direct physical loss  
15 of or damage to other premises, and if we can carry that  
16 burden after the demurrer in discovery, then we win this  
17 case.

18 But I think all you have to do right now is  
19 ask yourself, can the coronavirus cause direct physical  
20 loss of or damage to any property? And again, we would  
21 submit that under the 16 cases we cited, the test is  
22 whether there is a presence of a hazardous substance,  
23 and whether the quantity of that substance renders the  
24 property dangerous to human health and renders the  
25 property unusable, we think that there is no tangible

1 alteration to the property required under this policy.

2 So our burden to invoke code civil authority  
3 coverage is to show that somewhere within the County of  
4 Monterey or the County of San Mateo that there was  
5 coronavirus in such concentration that some property was  
6 rendered uninhabitable or unusable because of the  
7 concentration of coronavirus. And we certainly think we  
8 can meet that burden in discovery, but for now, the  
9 Court has to merely analyze whether we alleged enough to  
10 meet that bar.

11 THE COURT: Thank you. Mr. Keller?

12 MR. KELLER: Yes, your Honor. So I think that  
13 your analysis is spot-on and exactly how you should be  
14 looking at these issues. So let me first address the  
15 issue that gave you pause.

16 So the courts outside of California, as you  
17 mentioned, got into issues like asbestos and carbon  
18 monoxide, and those are, as you point out, ultimately  
19 not just directed at losses. It also needs to have the  
20 business income loss be caused by that direct physical  
21 loss. Like the carbon monoxide situation, it's,  
22 Everybody out of the building. You are going to die  
23 from carbon monoxide.

24 The asbestos, there is direct health problems.  
25 There is a smell that is related to a lot of those

1       claims that you are referring to. And so to have  
2       everybody out of the building, that causes the business  
3       income loss.

4               Here, the Court need not turn a blind eye to  
5       the realities of the pandemic and the business situation  
6       where the businesses are open while this pandemic is  
7       still ongoing, and that's a result of the fact that it  
8       is designed to keep people socially distanced and reduce  
9       the spread of the pandemic, and that is why the the  
10      shelter is in place so they don't prohibit access of  
11      civil authority coverage requires to even allow the  
12      hotels to keep people there, which they couldn't in the  
13      case of a carbon monoxide, asbestos situation.

14             And further, those cases, again, are outside  
15      of California. The direct physical requirement as  
16      prefix to the insurance agreement have to be considered  
17      under the context for *MRI Healthcare*, and *MRI Healthcare*  
18      says that it's excluded and accompanied by demonstrable  
19      physical alteration of the property.

20             So I believe that when you follow the analysis  
21      of the policy language under the California case in *MRI*  
22      *Healthcare*, that it is not a business income loss caused  
23      by direct physical damage to property, and the plaintiff  
24      has certainly not alleged that. At most, they've  
25      alleged a physical presence on the property of the virus

1 and not that that has caused the business income loss,  
2 nor can they because as I noted, they could have had  
3 people there. They chose to cease and close down based  
4 on the counties' orders, and that was the cause of their  
5 loss.

6 THE COURT: Well, let me just correct you. I  
7 don't think they chose to shut down. They were ordered  
8 to shut down.

9 MR. KELLER: Yes. They followed the shelter  
10 in place orders, and they -- what I meant by that was  
11 there was some level of operations that they could have  
12 had under the county order such as maybe economically  
13 disadvantaged individuals that they still could have  
14 provided shelter to. To completely shut down was not a  
15 complete mandate by the counties.

16 But irrespective of that finer point, there is  
17 no direct physical damage to property that caused the  
18 business income loss.

19 THE COURT: Well, Mr. Ferguson, I completely  
20 disagree with Mr. Keller that anyone had a choice. I  
21 think we were all trying to follow the orders we were  
22 given, but in spite of that issue, having looked at the  
23 *MRI* case -- and I certainly agree with your  
24 representation that once you get to the facts of the *MRI*  
25 and the ramping up, the ramping down and all that, it

1       really is not at all like our case here.

2               However, I do think -- and help me with this,  
3       Mr. Ferguson -- I do think the *MRI* case is intended to  
4       be the framework by which we analyze these cases, and  
5       that case pretty much says that because of the need for  
6       a physical damage, that it precludes any claim in which  
7       the insured suffered a detrimental economic impact  
8       without the distinct, demonstrable physical alteration  
9       of the property. Help me out with that, Mr. Ferguson.

10              MR. FERGUSON: Yes. So a couple points on  
11       *MRI*, your Honor. First, the term 'physical, as the *MRI*  
12       court understands it is, losses that are intangible or  
13       incorporeal. That is what it is using to distinguish  
14       against physical, and I don't think that we alleged an  
15       intangible or incorporeal loss here.

16              We allege there are specific, physical  
17       microbes within our property that are contaminating the  
18       air that are hazardous to human health that are  
19       rendering it unusable. And I think to adopt the  
20       definition of direct physical loss of or direct physical  
21       damage to property, that it excludes the situation where  
22       you have an invasion by a physical force into the  
23       atmosphere of your property onto all the surfaces of  
24       your property and says that is not direct physical loss  
25       of or damage to property, it can't be the case.

1           When an insured purchased insurance, they are  
2           expecting that when there is a physical catastrophe that  
3           shuts down their operation, the insurance coverage will  
4           kick in and cover that, and I think that to the extent  
5           that *MRI* case suggests that there has to be tangible  
6           alteration in the sense that it is perceptible to the  
7           eye or to touch, that is simply dicta in that case.  
8           This Court is not required to follow *MRI Healthcare* on  
9           that rationale.

10           *MRI Healthcare* actually could have said what  
11           we are saying here. It could have said physical damage  
12           actually does include the physical invasion by hazardous  
13           substances that renders a property unusable, and the  
14           outcome would have been exactly the same in *MRI*  
15           *Healthcare*, and I am pointing that out to say that  
16           discussion of the meaning of direct physical loss of or  
17           damage to property wasn't central.

18           One other point about *MRI Healthcare* is the  
19           language of coverage in that case and the relevant  
20           policy is actually different. The language of coverage  
21           in that policy, direct physical loss to or damage to  
22           property. In our case, it is direct physical loss  
23           of...property, and we think that difference in language  
24           is critical as we have suffered a direct physical loss  
25           of our property because it's been invaded, contaminated,

1 polluted by the hazardous substance that renders it  
2 unfit for human use, and the government saw the same  
3 hazard was present and ordered us to shut down our  
4 operations as a consequence of that.

5 And, your Honor, I think you previously had  
6 characterized the shutdown orders as requiring people to  
7 distance. And while that is part of the orders, they  
8 actually do go further than that, and this is critical.  
9 This is paragraph three of the Monterey order: All  
10 businesses within the facility in the county except  
11 essential businesses are required to cease all activity  
12 at facilities located within the county. That is a  
13 direct shutdown and a closure of our business that  
14 prohibits access to the business, which we think is  
15 enough to trigger the civil authority coverage.

16 Mr. Keller has made the point that there were  
17 very specific uses that we could have made about  
18 properties under these orders. We could have sheltered  
19 homeless people and possibly allowed a limited number of  
20 individuals to use the hotel as a residence.

21 What he is trying to do is read into the civil  
22 authority provision in our policy of requiring that  
23 there be a total prohibition of access to the insured  
24 premises. Well, that word 'total' doesn't actually  
25 appear in our insurance policy. All it says is the



1 government prohibits access to your premises and has  
2 done so as a consequence of a direct physical loss of or  
3 damage to the properties elsewhere, then insurance  
4 coverage kicks in.

5 I hope that addresses your concerns about *MRI*,  
6 your Honor.

7 THE COURT: It is helpful. Thank you.  
8 Mr. Keller, anything you would like to close with?

9 MR. KELLER: Yes, your Honor. So at the end  
10 of the day, the virus, whether it is present on the  
11 property or not, does not cause the business income  
12 loss, which it is required to under the policy, and it  
13 is not a direct physical loss as -- not a direct  
14 physical damage to property as described by *MRI*  
15 *Healthcare*.

16 And at the end of the day, they cannot allege  
17 that there was a direct physical damage to property that  
18 was, in fact, the cause of their business income loss.  
19 Thank you.

20 THE COURT: Any last words, Mr. Ferguson?

21 MR. FERGUSON: Yes, your Honor. Thank you.  
22 One last word is, I would urge the Court to reread *Ward*,  
23 which is the other case that California Mutual cites  
24 with the idea that you need a tangible alteration.

25 But what is critical in the *Ward* case is that

1       you have to analyze the scope of coverage within the  
2       context of the claims that are asserted. And so, you  
3       know, language that might appear unambiguous in the  
4       context of one particular claim might eventually appear  
5       ambiguous in the context of another claim.

6               So the two cases the defendant cites, *Ward* and  
7       *MRI*, are in such different factual circumstances of  
8       their own that I think, given the claims that we are  
9       asserting, the scope of the coverage within the policy  
10      has to be viewed within the lens of the claims that we  
11      are asserting.

12             And given the claims that we are asserting, I  
13      think that the insurance policy is, at a minimum,  
14      subject to two reasonable constructions. One is that as  
15      the defendants assert that there has to be physical  
16      alteration to the property. The other is the  
17      construction.

18             We think this is a reasonable interpretation,  
19      and given the Court's struggle with how to resolve this  
20      case, we think it's clear that reasonable minds can  
21      differ on this. If that is the case, the tie goes to  
22      the plaintiff as ambiguities are construed in favor of  
23      the insured.

24             And, your Honor, one last point. California  
25      Mutual actually has a virus exclusion that they include

1 in other policies. We raised this in the complaint. In  
2 fact, in their reply, they cite the *Michigan* case where  
3 the insurance policy issue in that case also had a virus  
4 exclusion. This is a well-known exclusion that is  
5 included in many, many, many policies throughout the  
6 country, and many of the cases in the wave of COVID  
7 litigation in the last few months are going to be  
8 decided on that virus exclusion angle.

9 Our client has dutifully paid almost \$40,000 a  
10 a year in insurance premiums to California Mutual under  
11 a policy that does not have a virus exclusion. This is  
12 critical, your Honor. The fact that California Mutual  
13 and the insurance industry at large has a virus  
14 exclusion very strongly suggests to us that they believe  
15 a virus -- the presence of a virus can cause direct  
16 physical loss of or damage to property. That was not  
17 included in this policy.

18 California Mutual very easily could have  
19 tacked on the word 'virus' using a comma after the word  
20 'bacteria' in the bacteria exclusion. They could have  
21 included the presence of virus from the insurance  
22 policy, and they failed to do so.

23 So California Mutual having failed to define  
24 the central term in this case, direct physical loss of  
25 or damage to property, and having failed to include a

1 virus exclusion, we think the Court should adopt the  
2 plaintiff's very reasonable construction of this  
3 insurance policy and find that our allegation that there  
4 is physical presence of coronavirus and hazardous  
5 concentration on our property is sufficient to trigger  
6 business income interruption insurance coverage, as well  
7 as the fact that there is coronavirus-inhabited  
8 concentration on other properties triggered the  
9 government to close our facilities.

10 Or in the alternative, we are also entitled to  
11 civil authority coverage. And I think with that, your  
12 Honor, we would submit.

13 THE COURT: All right. The Court is going to  
14 take this under submission. It seems to me that if the  
15 Court decides to sustain the demurrer, that the motion  
16 to strike is moot, so I don't want to hear argument on  
17 that.

18 Anyway, I just want to spend more time  
19 thinking about it, and I appreciate your thoughtful  
20 argument. If for any reason I decide that I need  
21 additional argument, I will let you know, but otherwise,  
22 I hopefully will be able to let you know very soon.  
23 Thank you.

24 MR. FERGUSON: Thank you, your Honor.

25 MR. KELLER: Thank you, your Honor.

1                   MR. FERGUSON:  Should there be any additional  
2                   briefing or legal issues you should like us to address,  
3                   we would be happy to do so.

4                   THE COURT:  This is Mr. Ferguson talking?

5                   MR. FERGUSON:  I am sorry.  Mr. Ferguson, yes,  
6                   your Honor.

7                   THE COURT:  Thank you very much.

8                   (Whereupon, the proceedings adjourned at 9:55  
9                   a.m.)

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1 STATE OF CALIFORNIA )  
2 ) SS.  
3 COUNTY OF MONTEREY )  
4

5 I, Jamie L. Setterquist, an official reporter  
6 for the Superior Court of the State of California, in  
7 and for the County of Monterey, do hereby certify:

8 That, as such reporter, I reported  
9 stenographically the above proceedings on Monday, August  
10 4, 2020, and that the above and foregoing transcript,  
11 consisting of pages numbered from 1 to 19, inclusive,  
12 contain a true and correct transcript of all of said  
13 proceedings.  
14

15 Dated at Salinas, California, this August 7,  
16 2020.  
17  
18

19   
20 JAMIE L. SETTERQUIST CSR 13362  
21 OFFICIAL COURT REPORTER  
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